Supreme Court, U.S.
FILED
OCT 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-467

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ILLINOIS PRO-LIFE COALITION, INC., III,
Petitioner,

v.

LOUIS G. KEITH, M.D., et al.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ISSUE PRESENTED FOR REVIEW

1. Whether the court of appeals properly found that proposed intervening defendant, Illinois Pro-Life Coalition, Inc., III ("IPC"), petitioner herein, whose stated organizational "interests" are lobbying and adopting children, failed to satisfy the requisites of Rule 24(a)(2), Fed.R.Civ.P., and thus could not intervene of right in a lawsuit where the only issue posed is whether a criminal abortion statute fails to conform to the Constitution of the United States.

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

(See Petition for Certiorari)

JURISDICTION

(See Petition for Certiorari)

STATUTORY PROVISION INVOLVED

Rule 24(a)(2), Fed.R.Civ.P.

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to invervene in an action:

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

Plaintiff-physicians, respondents herein, initiated this lawsuit pursuant to 42 U.S.C. § 1983, challenging the constitutionality of Illinois House Bill 1399 ("HB 1399").[1] HB 1399 would amend the Illinois Abortion Law of 1975, a criminal statute which regulates physicians who perform abortions.

The amendments contained in HB 1399 propose comprehensive regulation of the abortion decision, much of which contravenes *Roe v. Wade,* 410 U.S. 113 (1973), and its progeny, and include provisions which: declare that human life begins at conception (§ 2(6)); require physicians to provide written certification that an abortion was medically necessary (§ 3.1); require physicians to certify in writing the available abortion methods and the reasons for choosing the method used (§§ 6(1) and 6(4)); require physicians to elevate fetal life above that of the pregnant woman (§ 6(1)); require physicians to use "life-saving" abortion techniques upon non-viable fetuses (§ 6(4)); subject physicians to prosecution under the homicide laws for aborting non-viable fetuses (§ 6(3)); and, require physicians to inform their patients about "fetal pain," and to offer patients anesthetics for fetal pain (§ 6(6)). Plaintiff-physicians would stop performing abortions if HB 1399 goes into effect because of the criminal penalties it would impose. (Zbaraz affidavit at ¶ 3(f), Rosner affidavit at ¶ 4,

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[1] Plaintiffs include Arthur L. Herbst, M.D., Chairman of the Department of Obstetrics and Gynecology at the University of Chicago, Pritzker School of Medicine, William Spellacy, M.D., Chairman of the Department of Obstetrics and Gynecology at the University of Illinois School of Medicine, David Zbaraz, M.D., a clinical professor of Obstetrics and Gynecology at the University of Chicago, Pritzker School of Medicine, and Louis G. Keith, M.D., a professor of Obstetrics and Gynecology at Northwestern University School of Medicine.

Keith affidavit at ¶ 3(b),(d), filed with Plaintiffs' Memorandum In Support Of A Temporary Restraining Order).[2]

Accordingly, plaintiff-physicians initiated this action challenging HB 1399 and named as defendants Attorney General Hartigan, States Attorney Daley, and the Acting Director of the Illinois Department of Public Health, the state officials charged with the duty of either enforcing the Illinois Abortion Law or defending its constitutionality. Under Illinois law, the duty for initiating prosecutions rests with the 102 State's Attorneys. Ill. Rev. Stat. ch. 14, ¶ 5 (1983). The Attorney General has the authority both to defend the constitutionality of a challenged state statute and to represent any other state official in federal court. Ill. Rev. Stat. ch. 14, ¶ 4 (1983).

Pursuant to Illinois law, neither proposed intervenor Illinois Pro-Life Coalition, III ("IPC") nor its individual members could be named as defendants because, as private parties, neither IPC nor its members could initiate criminal prosecutions under this criminal abortion law or defend the State of Illinois in federal court. Nonetheless, IPC sought leave to intervene in the district court as a party defendant, asserting the "interests" of its members in adopting children, lobbying for legislation that protects fetuses, and presenting alternatives to abortion. (IPC Petition at 7-8).[3] IPC claimed no authority to enforce or defend this criminal statute.

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[2] Nine of the statutory provisions amended by HB 1399 merely constitute reenacted and renumbered sections identical to provisions held unconstitutional and permanently enjoined in earlier litigation surrounding the Illinois Abortion Law. *Charles v. Carey*, 579 F. Supp. 377 (N.D. Ill. 1983), and *Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983), *aff'd in part, rev'd in part, Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted, Diamond v. Charles*, No. 84-1379, ____ U.S. ____, 53 U.S.L.W. 3824 (May 20, 1985).

[3] Citations to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by IPC are referred to as the "IPC Petition at ____." Citations to the appendix attached to that Petition are referred to as "App. at ____"

Plaintiff-physicians invited IPC to participate as *amicus curiae* but opposed intervention because IPC failed to satisfy the requirements of either Rule 24 (a) or (b), Fed.R.Civ.P., namely: (1) IPC did not have a substantial protectable interest in the subject matter of this lawsuit; (2) IPC's "interests" in adoption and lobbying would not be impaired if it were not allowed to intervene as a party defendant; (3) IPC's "interests" in the constitutionality of HB 1399 were adequately represented by the State defendants; and (4) any delay caused by IPC's intervention would be undue and prejudicial. (Plaintiff-physicians' Memorandum In Opposition to Intervention at 2-20.) Both sides submitted briefs and presented oral argument to the district court.

The district court denied IPC intervention of right pursuant to Rule 24(a)(2). In support of this holding, the district court held that IPC asserted no direct, significant, legally protectable interest that would be impaired if IPC were denied intervention. (App. at 36.) Exercising its discretion, the district court also held that IPC could not intervene permissively pursuant to Rule 24(b)(2). (App. at 38.) The court expressly allowed IPC leave to file briefs as *amicus curiae,* advising IPC that the court would consider carefully any such briefs IPC filed. (App. at 38.).

The United States Court of Appeals for the Seventh Circuit affirmed, *Keith v. Daley,* App. at 1-32, holding that IPC could not satisfy the requirements for intervention under the Federal Rules of Civil Procedure.[4] Prior rulings of this Court and the express terms of Rule 24 support the Seventh Circuit's decision.

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[4] Petitioner does not raise, and thus waives, any objection to the court of appeals' decision that IPC was not entitled to permissive intervention pursuant to Rule 24(b)(2), Fed.R.Civ.P.

REASONS FOR DENYING CERTIORARI

I.

IPC HAS NO SIGNIFICANTLY PROTECTABLE INTEREST THAT WILL BE IMPAIRED IF IPC'S PARTICIPATION IN THIS LITIGATION IS LIMITED TO THAT OF AN *AMICUS CURIAE* RATHER THAN AN INTERVENING DEFENDANT.

Rule 24(a)(2) expressly sets forth four requirements which a proposed intervenor must satisfy before intervention of right is allowed: (1) the applicant's request must be timely;[5] (2) the applicant must have a direct, significant and protectable interest in the subject matter of the litigation; (3) the applicant's interest must be impaired by disposition of the action without the applicant's involvement; and (4) the existing parties do not adequately represent the applicant's interest. The applicant has the burden of proving each component; failure to establish even one component dictates that the motion to intervene be denied. *United States v. 36.96 Acres of Land,* 754 F.2d 855, 858 (7th Cir. 1985).[6]

As recognized by the Seventh Circuit, IPC failed to satisfy even one of these substantive requirements. The standards applied by the district court and the Seventh Circuit when performing the fact-specific evaluation of interest, impairment, and adequacy of representation are in full agreement with the

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[5] The timeliness of IPC's application for intervention is not in dispute here.

[6] The three substantive components of Rule 24(a)(2), interest, impairment, and inadequacy, "are not bright lines, but ranges—not all 'interests' are of equal rank, not all impairments are of the same degree, [and] representation by existing parties may be more or less adequate, . . ." *United States v. Hooker Chemicals & Plastics Corp.,* 749 F.2d 968, 983 (2d Cir. 1984). Thus, proper application of Rule 24(a)(2) requires that the three components be treated as different facets of the same problem. *Keith v. Daley,* App. at 8, *citing* 3B *Moore's Federal Practice* ¶ 24.07 [1] at 24-51 [2d ed. 1985]; *Hooker,* 749 F.2d at 983, *citing Moore's, supra.*

language and intent of Rule 24(a)(2) as interpreted by this Court and the majority of the circuit courts of appeal. IPC's proposed construction of Rule 24 would convert the federal courts into a sophisticated version of a college debating society, a result eschewed both by the precise terms of Rule 24 and Article III of the Constitution.

A. This Court And The Majority Of The Circuit Courts Require An Applicant To Establish A Direct And Protectable Interest To Justify Intervention Of Right.

Since the 1966 amendments to Rule 24, the Court has had opportunity to review the application of Rule 24(a)(2). *See, e.g., Donaldson v. United States,* 400 U.S. 517 (1971) ("*Donaldson*"); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967). Most recently in *Donaldson,* this Court stated explicitly that to intervene pursuant to Rule 24(a)(2), the applicant must assert "a significantly protectable interest." 400 U.S. at 531.

Consistent with the position of this Court, the Seventh Circuit articulated the "interest" requirement of Rule 24(a)(2) as demanding that the proposed intervenor demonstrate a direct, significant and legally protectable interest in the subject matter of the litigation before intervention would be allowed. *Keith v. Daley,* App. at 8. That interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit. *Keith v. Daley,* App. at 9. Contrary to IPC's contention, the Seventh Circuit in this case construed the interest requirement in a manner consistent with its prior holdings. *See, e.g., United States v. 36.96 Acres of Land,* 754 F.2d 855, 858 (7th Cir. 1985); *Wade v. Goldschmidt,* 673 F.2d 182, 185 (7th Cir. 1982), *citing Donaldson v. United States,* 400 U.S. 517, 531 (1971); *Heyman v. Exchange National Bank of Chicago,* 615 F.2d 1190, 1193 (7th Cir. 1980).

The circuit courts of appeal which have considered the issue, with the exception of the Ninth Circuit,[7] have adopted this construction of the interest requirement of Rule 24(a)(2). Neither the Ninth Circuit nor any other circuit has held that a general public policy interest, in the absence of an individual protectable interest, is sufficient to justify intervention of right. *See, e.g., Restor-A-Dental Lab v. Certified Alloy Prod.,* 725 F.2d 871, 874 (2d Cir. 1984)(applicant's interest must be "significantly protectable" and "direct, as opposed to remote or contingent"); *Westlands Water District v. United States,* 700 F.2d 561, 563 (9th Cir. 1983) (public policy interest insufficient to justify intervention); *Athens Lumber Co., Inc. v. Federal Election Comm'n,* 690 F.2d 1364, 1366 (11th Cir. 1982) ("intervention of right must be supported by 'direct, substantial, legally protectable interest in the proceeding' "); *United States v. Perry County Board of Education,* 567 F.2d 277, 279 (5th Cir. 1978), *quoting Diaz v. Southern Drilling Co.,* 427 F.2d 1118, 1124 (5th Cir.), *cert. denied,* 400 U.S. 878 (1970) ("interest element of Rule 24(a)(2) requires a 'direct, substantial, legally protectable interest' in the proceedings"); *Planned Parenthood v. Citizens for Community Action,* 558 F.2d 861, 869 (8th Cir. 1977) ("interest identified must be more than peripheral or insubstantial; the applicant must assert a 'significantly protectable interest' "); *Blake v. Pallan,* 554 F.2d 947, 953 (9th Cir. 1977) (impractical to base a finding of sufficient interest for intervention solely on public policy grounds); *Commonwealth of Pennsylvania v. Rizzo,* 530 F.2d

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[7] The Ninth Circuit has vacillated between applying a standard consistent with that adopted by this Court and a majority of the circuits, and the more liberal standard to which IPC clings in its Petition. *Compare Smith v. Pangilinan,* 651 F.2d 1320, 1324 (9th Cir. 1981), *quoting Donaldson v. United States,* 400 U.S. 517 (1971), (applicant "must show that he has a 'protectable interest' in the outcome the litigation of sufficient magnitude to warrant inclusion . . .") *with Washington State Bldg. & Const. Trades v. Spellman,* 684 F.2d 627, 630 (9th Cir. 1982) ("Rule 24 traditionally has received a liberal construction in favor of applicants for intervention"). If indeed there is an inconsistency in the standard applied by the Ninth Circuit, that is an issue for *en banc* consideration by that court. Rule 35(a), Fed.R.App.P.

501, 504 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976) (the party must have a "sufficient interest" in the matter that would be affected by the disposition); *Allard v. Frizzell,* 536 F.2d 1332, 1333 (10th Cir. 1976) ("interest asserted in the subject of the litigation must be a specific legal or equitable one"); *Nuesse v. Camp,* 385 F.2d 694, 699 (D.C. Cir. 1967) ("applicant for intervention must have an 'interest' in the 'transaction' which is the subject of the action"). *See also Avery v. Heckler,* 584 F. Supp. 312, 316 (D. Mass. 1984) ("interest required must be direct and substantive").

In summary, this Court and the circuit courts of appeal have required intervenors to make a vigorous showing of a significant and protectable personal interest. Intervention of right has not been allowed, and cannot be allowed, solely on the basis IPC asserts here—"interest" in a statute, *i.e.,* a public law, that is a matter of public concern.

B. The Seventh Circuit Correctly Held That IPC Failed To Assert A Direct and Protectable Interest That Would Allow Intervention Of Right Under Rule 24(a)(2).

Application of the "direct, significant and legally protectable" standard to the "interests" asserted by IPC confirms the Seventh Circuit's conclusion: IPC's "interest," the protection of fetal rights, the desire of IPC members to adopt children, and the championship of HB 1399 in the legislature, do not meet the interest requirement of Rule 24(a)(2) for intervention of right in this litigation. The only interest presented in the pending litigation is the constitutionality of a criminal statute. Thus, the "governmental bodies charged with compliance can be the only defendants." *Keith v. Daley,* App. at 14.

1. IPC has no authority—legal or otherwise—to assert fetal rights.

IPC has no legally protectable interest in protecting unborn children. *Keith v. Daley,* App. at 21-22. Although IPC may

share the interest of many Americans in the abortion issue, concern for the "rights" of the unborn is *not* a legally protectable interest. This Court has rejected unequivocally the argument that a fetus has constitutional rights. *Roe v. Wade,* 410 U.S. at 156-57. By contrast, the right of a woman to choose to have an abortion *is* a fundamental constitutional right which can be interfered with only upon a showing of a compelling state interest. *Roe,* 410 U.S. at 153.

Only after viability does the state's interest in potential life become compelling enough to justify limited regulation of the abortion process. *Roe,* 410 U.S. at 163-64. As noted by the Seventh Circuit, App. at 21-22, citing *Roe v. Wade,* 410 U.S. 113 (1973), and *Planned Parenthood of Missouri v. Danforth,* 428 U.S. 52 (1976), it is undisputed that the state, and *only* the state, can legally assert this interest in protecting viable fetal life. Thus, IPC has no legally protectable interest in asserting or protecting what it claims to be the right of the fetus to continued life. This Court must reject IPC's attempt to don the cloak of Fetal Guardian Ad Litem At-Large.

2. IPC's interest in adoption cannot be satisfied in these proceedings.

The Seventh Circuit also rejected IPC members' interest in adopting fetuses "born alive" after abortions as "too speculative" to satisfy Rule 24. *Keith v. Daley,* App. at 23. Women in Illinois cannot have abortions after the onset of viability unless necessary to preserve their life or health. Ill. Rev. Stat. ch. 38, ¶ 81-25 (1983). IPC's assumption that any surviving fetus would be available for adoption apparently relies upon another section of the Illinois Abortion Law which provides for the termination of parental rights in any fetus surviving an abortion. Ill.Rev.Stat. ch. 38, ¶¶ 81-27, 81-28 (1984). This section, however, has been struck down as unconstitutional. *Wynn v. Scott,* 449 F. Supp. 1302 (N.D. Ill. 1978), *aff'd,* 599 F.2d 193 (7th Cir. 1979). As noted by the Seventh Circuit, "[t]he

precarious history of these statutes suggests that IPC's reliance on these statutes as an indication that fetuses born alive after abortions will be automatically available for adoption is foolhardy." *Keith v. Daley,* App. at 25.

3. IPC's desire to continue its legislative activities is not an interest that can be asserted or protected in a judicial forum.

IPC contends that its third "interest"—that of the lobbyist behind HB 1399—is made cognizable by virtue of its interest in "the protection of unborn and newly born children and of its members' interests in adopting children who survive abortions." (IPC Petition at 27-28.) This is a classic example of bootstrapping. By necessity, it must fail here. IPC's interest as a lobbyist does not in itself meet the requisite interest standard. Nor does it meet that standard because IPC feels that it is important to participate as a party to protect its other non-litigable interests.

As held by the Seventh Circuit, an interest in legislative lobbying "is not a direct and substantial interest to support intervention in the instant lawsuit." *Keith v. Daley,* App. at 13. *See also United States v. 36.96 Acres of Land,* 754 F.2d 855 (7th Cir. 1985) (group which had lobbied for legislation authorizing acquisition of contested land denied intervention in condemnation suit brought by United States to acquire the land). The fact that IPC considers abortion "one of the most pressing and controversial public policy issues of our time" (IPC Petition at 11), does not mean that federal courts must afford party status with full rights of participation to any group which has taken part in the public debate in the legislative arena.[8]

The Illinois Abortion Law of 1975, as amended by HB 1399, would impose numerous restrictions upon plaintiff-

[8] Accepting the construction of interest advocated by IPC would mandate intervention of right for each of the numerous pro-choice individuals and groups who opposed the enactment of HB 1399.

physicians who perform abortions in the course of their practice of medicine and, as a matter of course, would restrict the rights of women who wish to terminate their pregnancies. Plaintiffs thus named as defendants the parties who are legally responsible for the enforcement of the Illinois Abortion Law and the defense of its constitutionality, the Illinois Attorney General and the Cook County State's Attorney. *Keith v. Daley,* App. at 14.

Obviously, plaintiff-physicians could not and did not name IPC as a defendant to this action. IPC bears no responsibility for enforcing or defending this criminal legislation. The desire of IPC to enact legislation supportive of the personal views of IPC members as to the beginning of life and the morality of abortion is not a legal issue, and obviously, is not an indispensable consideration for resolution of the merits of this lawsuit. As found by the Seventh Circuit, "Rule 24(a) precludes a conception of lawsuits, even "public law" suits, as necessary forums for such public policy debates." *Keith v. Daley,* App. at 19.

4. The generalized grievances raised by IPC will in no way be impaired by this litigation.

IPC's failure to assert a direct, significant and legally protectable interest necessarily undermines IPC's ability to satisfy the second substantive criteria demanded by Rule 24(a)(2)—impairment of interest. Impairment exists only if the resolution of a legal question would, as a practical matter, foreclose rights of the proposed intervenor in a subsequent proceeding. *Meridian Homes Corp. v. Nicholas W. Prassas & Co.,* 683 F.2d 201, 204 (7th Cir. 1982).

IPC's foremost concern of protecting the "interests of unborn and newly born children" (IPC Petition at 38) cannot be impaired by this litigation, because as discussed above at pages 8-9, IPC has no legal authority to protect potential life.

IPC, moreover, can make no showing that more children will be "born alive" or that such children will be available for adoption if HB 1399 is upheld. Furthermore, judicial approval is necessary to effectuate every adoption. Ill. Rev. Stat. ch. 40, ¶¶ 1501 *et seq.* (1983). As found by the Seventh Circuit, a decision on the constitutionality of HB 1399 will have no impact on the eligibility of IPC's members to adopt children or on a juvenile court's decision approving any possible adoption proposed by one of IPC's members. *Keith v. Daley,* App. at 22-26.

IPC's additional concern that the issuance of a permanent injunction against HB 1399 would leave it "unable to protect its interests through future legislation or litigation" (IPC Petition at 29-30) does not merit serious consideration. Resolution of the merits of the *Keith* lawsuit, even without IPC's intervention, will not impair IPC's legislative maneuvering. The Illinois General Assembly has a protracted history of enacting restrictive abortion legislation, much of it drafted by IPC's counsel, without reference to federal court injunctions of existing Illinois anti-abortion legislation. *Charles v. Daley,* 749 F.2d 452, 458 (7th Cir. 1984), *prob. juris. noted, Diamond v. Charles,* No. 84-1379, ____ U.S. ____, 53 U.S.L.W. 3824 (May 20, 1985).

IPC's final concern that it would be precluded from protecting its "interests" in future litigation also lacks merit. As discussed above, IPC could not have been named as a defendant in this action. Nor is there any potential for future liability on the part of IPC. In short, IPC asserts no legally protectable interests that it has standing to protect. Therefore, IPC faces no impairment of its asserted litigation "rights."[9]

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[9] *See New Orleans Public Service, Inc. v. United Gas Pipe Line Co.,* 732 F.2d 452, 473 (5th Cir.) (en banc), *cert. denied,* ____ U.S. ____, 105 S. Ct. 434 (1984) (leave to participate as *amicus* more appropriate than intervention when applicant lacks a legally protectable interest).

C. This Court Has Never Approved Intervention Of Right Absent A Vigorous Showing Of The Requisite Interest.

Despite the foregoing authority, IPC contends that a decision of this Court, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129 (1967) ("*Cascade*"), supports wide-spread intervention whenever a statute of interest to the public is at issue. IPC suggests that this Court in *Cascade* construed Rule 24 as approving a less rigorous standard of "interest" in cases involving a "public law" or "public interest." *Cascade* does not support this proposition.

First, both proposed intervenors in *Cascade*—the State of California and Cascade Natural Gas Corp.—had demonstrated a substantial economic interest in enforcement of this Court's earlier order directing the El Paso Natural Gas Company to divest itself of the Pacific Northwest Company. 386 U.S. at 132-36. Further, the State of California had a substantive right to be free of antitrust injury to its general economy. *Id. See also New Orleans Public Service, Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 466, n.28 (1984) (5th Cir.) (*en banc*), *cert. denied*, ____ U.S.____, 105 S.Ct. 434 (1984), *citing Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945). IPC asserts no such economic interest here. Second, this Court itself expressed substantial doubt as to the adequacy of the representation provided by the United States government in enforcing this Court's divestment order. *Cascade*, 386 U.S. at 136. *See also United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d at 986 n. 15. No such inadequacy has been shown here. See pages 19-22, *infra*.

Nowhere in *Cascade* did this Court identify a separate subcategory of litigation delineated "public law" cases for which a less stringent showing of litigable interest would be required. The sole reference to the term "public law" involved this Court's citation of *Missouri-Kansas Pipeline Co. v. United States*, 312 U.S. 502, 506 (1941) ("*Pipeline*"). The "public

law" involved in *Pipeline* was a Federal antitrust statute. In *Pipeline,* the consent decree between the United States and the Missouri-Kansas Pipe Line Company was drafted specifically to protect the economic independence of a private party—the Panhandle Eastern Pipe Line Company. When the government later sought modification of the consent decree, Panhandle was allowed to intervene to protect its private economic interests, which had been separately provided for in the consent decree.

The economic interests recognized as supporting intervention in the litigation of the "public laws" involved in *Cascade* and *Pipeline* are precisely the type of direct, significant and legally protectable interests required by Rule 24. Thus, IPC's citation of *Cascade* to support its proposition that a different standard for intervention exists when a case involves a statute, *i.e.,* a "public law," is not supported by either the facts or the holdings of these cases.

D. The Circuit Court Authority Cited By IPC Supports Neither A Different Interpretation Of The Interest Standard Than That Employed By The Seventh Circuit Nor IPC's Own Claim For Intervention Of Right.

IPC also attempts to build its argument for a less stringent interest standard in "public law" cases through a series of misleading statements about the conclusions drawn by several circuit courts of appeals. On closer review, these cases support respondents', and not IPC's position.

For example, in support of its claim for intervention, IPC cites two cases decided by the D.C. Circuit, *Natural Resources Defense Council v. Costle,* 561 F.2d 904 (D.C. Cir. 1977) ("*NRDC*"), and *Nuesse v. Camp,* 385 F.2d 694 (D.C. Cir. 1967) ("*Nuesse*"). Although the D.C. Circuit employed broad language when describing the requisite interest, its application of that requirement demanded the same direct and significant interest required by this Court and the other circuit courts of

appeal. See discussion, *supra,* at 6. Accordingly, despite IPC's carefully chosen language from *NRDC* and *Nuesse,* neither case supports IPC's contention that the Seventh Circuit erroneously applied Rule 24(a)(2).

At issue in *NRDC* was the Environmental Protection Agency's (EPA) regulation, under the Federal Water Pollution Control Act, of toxic discharges. Pursuant to a settlement agreed upon by the parties, the EPA was to promulgate regulations which would establish normal levels of pollutants, clean-up priorities and timetables on an industry-by-industry basis. Several chemical companies requested intervention, seeking to protect their economic interests by participation in the rule-making process by which the EPA would determine the applicable pollution standards. The D.C. Circuit, applying Rule 24(a)(2), necessarily found that the proposed intervenors asserted a strong economic interest that, undoubtedly, would have been impaired had intervention been denied.

A different but equally important litigable interest was raised in *Nuesse.* At issue there was whether the United States Comptroller for the Currency, acting under the National Bank Act, properly had issued a certificate granting a Wisconsin bank chartered by the Federal government, *i.e.,* a national bank, permission to open a branch bank near the plaintiff bank, which was chartered by the state of Wisconsin. The National Bank Act, in essence, made approval of branch banking by national banks contingent upon state law. At the time of the litigation, Wisconsin state law prohibited state chartered banks from branch banking. The Wisconsin Commissioner of Banks sought to intervene as a plaintiff. The D.C. Circuit approved intervention, holding that because Congress had specifically incorporated state law into the National Bank Act, a state official responsible for the construction and enforcement of the state law asserted the requisite "interest in a legal controversy involving the [federal] Comptroller . . . ." 385 F.2d at 700.

IPC also cites an opinion of the Second Circuit, *New York Public Interest Research Group v. Regents of University of State of New York*, 516 F.2d 350 (2d Cir. 1975)("*NPIRG*"), to support its argument that the Second Circuit has adopted a broad application of the "interest" requirement in public law cases. IPC's reliance again is misplaced. The intervenors in *NPIRG* were the Pharmaceutical Society of New York and three individual pharmacists. The Second Circuit granted them leave to intervene as defendants in an action brought by consumers to enjoin enforcement of a regulation which prohibited advertising the price of prescription drugs. As noted by that court, this regulation affects the economic interests of members of the pharmacy profession." *Id.* at 352. Thus, the pharmacists and the Pharmaceutical Society intervened not to protect the public interest, but rather to protect their own individual economic interests which would have been directly impaired by a holding that the regulation was unconstitutional. More recently the Second Circuit, in *Hooker*, 749 F.2d. 968, rejected the argument that *NPIRG* supported broad "public law" intervention. The court in *Hooker* refused intervention to four environmental groups in a hazardous waste disposal action initiated by the federal government.

Nor should this Court be mislead by IPC's citation of *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir.) (*en banc*), *cert. denied*, ____ U.S. ____, 105 S.Ct. 434 (1984) ("*New Orleans*"). In *New Orleans*, the Fifth Circuit *denied* intervention to a group of electric customers of the plaintiff utility company, including the City of New Orleans. Moreover, the court expressly stated that "we have never departed from" the standard that "intervention [of right] still requires a 'direct, substantial, legally protectable interest in the proceedings.' " *Id.* at 463, *quoting Hobson v. Hansen*, 44 F.R.D. 18, 24 (D.D.C. 1968). *See also Piedmont Heights Civic Club v. Moreland*, 83 F.R.D. 153 (N.D. Ga. 1979) (non-profit corporations organized to advance interests of City of Atlanta

denied intervention in suit challenging governmental failure to comply with federal statues when planning to increase capacity of interstate highway system).[10]

IPC's reliance upon *Planned Parenthood v. Citizens for Community Action,* 558 F.2d 861 (8th Cir. 1977), also is misplaced. Although this case is the paradigm of what IPC would call a public law case, its holding directly undermines IPC's argument. In *Planned Parenthood,* the Court allowed a neighborhood association and two couples residing in the vicinity of a proposed clinic to intervene in an action by Planned Parenthood challenging the constitutionality of an ordinance which prohibited it from building the clinic. These parties sought to intervene to defend the ordinance in order to preserve their property values. As noted by the court, " '[i]nterests in property are the most elementary type of right that Rule 24(a) is designed to protect.' " *Id.* at 869, *quoting Diaz v. Southern Drilling Corp.,* 427 F.2d 1118, 1124 (5th Cir.), *cert. denied,* 400 U.S. 878 (1970). Thus, intervention was based on a direct economic interest which the parties clearly had established might be impaired.

Similar economic interests were at stake in the Tenth Circuit cases cited by IPC. In *National Farm Lines v. I.C.C.,* 564 F.2d 381 (10th Cir. 1977), the proposed intervening defendants, common carriers operating under I.C.C. certificates, asserted economic interests that were directly affected by

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[10] In finding that proposed intervenors' generalized interest in the improvement of Atlanta did not meet the interest requirement of Rule 24(a)(2), the district court stated,

> The holding of the Court will not affect a statute which governs the movants' actions, nor will it directly alter contractual or other legally protectable rights of the organizations seeking intervention.

83 F.R.D. at 158. Likewise here, the criminal statute in question, HB 1399, does not govern IPC's actions, and a holding relating to its constitutionality will not directly alter contractual or other legally protectable rights of IPC.

the pending litigation. Plaintiff, National Farm Lines, an agricultural cooperative had sued the I.C.C., challenging the constitutionality of statutes and regulations which limited the extent to which agricultural cooperatives could engage in transportation for hire by motor vehicles in interstate commerce. If the cooperative succeeded in having the statute struck down, current I.C.C. licensees would have faced heightened competition, thereby directly threatening their economic well-being. As the court noted, "there can be no question about the existence of an interest on the part of the present petitioners." *Id.* at 384.

Again, in *Natural Resources Defense Council v. U.S. Nuclear Reg. Comm'n,* 578 F.2d 1341 (10th Cir. 1978), also cited by IPC, the Tenth Circuit illustrated the direct and substantial interest necessary to justify intervention of right under Rule 24(a)(2). Plaintiffs in *Natural Resources* challenged the attempt by governmental agencies to issue a license to United Nuclear for the operation of a uranium mill in New Mexico without first preparing environmental impact statements. A group of companies who were recipients of licenses and the American Mining Congress sought to intervene. Citing *Donaldson v. United States,* 400 U.S. 517 (1971) and *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129 (1967), the court held that the intervenors had a significantly protectable interest which might as a practical matter be impaired by the outcome of the litigation. If, as a result of the litigation, United Nuclear were required to file an environmental impact statement as a prerequisite to receiving a license, when the intervenors' licenses came up for renewal they, in all likelihood, also would be required to file such statements. Thus, the intervenors had a direct economic interest in the litigation.

In each of the cases IPC cites, the successful intervenors asserted an economic or other legally protectable interest. IPC asserts no such interest here. On the facts presented in this

litigation, the Seventh Circuit correctly set forth and applied the interest standard as that requirement has been construed by this Court and a majority of the circuit courts of appeal. Accordingly, IPC cannot support its Petition for a Writ of Certiorari.

II.

THE NAMED GOVERNMENTAL DEFENDANTS ADEQUATELY REPRESENT THE PURPORTED INTERESTS OF IPC.

Even assuming that IPC could meet the burden of establishing an interest, as a final precondition to intervention of right, Rule 24(a) requires the applicant to demonstrate that its alleged interests will not be adequately represented by existing parties. IPC can make no such showing here. As observed by the Seventh Circuit, "the [governmental] defendants are ably representing HB 1399." *Keith v. Daley,* App. at 19.

A court can presume adequacy of representation when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor. *United States v. South Bend Community School Corp.,* 692 F.2d 623, 628 (7th Cir. 1982), *citing Commonwealth of Pennsylvania v. Rizzo,* 530 F.2d 501, 595 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976); *United Nuclear Corp. v. Cannon,* 696 F.2d 141, 144 (1st Cir. 1982). The named defendants here have a statutory duty to make this defense. That defendants Hartigan and Daley may use different litigation tactics than those preferred by IPC does not overcome the presumption of adequacy. *United States v. South Bend Community School Corp.,* 692 F.2d at 628; *United States v. Board of School Comm'rs, Indianapolis, Ind.,* 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied,* 410 U.S. 909 (1973). Nor is the presumption rebutted by the fact that IPC would insist on more elaborate pre-trial or pre-settlement procedures. *Hooker,* 749 F.2d at 968, 985.

The presumption of adequacy is enhanced when the would-be intervenors have the same ultimate objectives as a party to the existing suit. *State of Texas v. United States Dep't of Energy,* 754 F.2d 550, 553 (5th Cir. 1985); *Baker v. Wade,* 743 F.2d 236, 240-241 (5th Cir. 1984); *United States v. South Bend Community School Corp.,* 692 F.2d 623, 627 (7th Cir. 1982); *Environmental Defense Fund v. Higginson,* 631 F.2d 738, 760 (D.C. Cir. 1979); *United States Postal Service v. Brennan,* 579 F.2d 188, 191 (2d Cir. 1978); *Nuesse v. Camp,* 385 F.2d 694, 703 (D.C. Cir. 1967). The named defendants here have the same ultimate objective as IPC—defending the constitutionality of HB 1399.

IPC's self-serving contention that defendants Hartigan and Daley "cannot match the thorough knowledge of the subject area held by the proposed intervenor" (IPC Petition at 12) cannot be supported by any citation to the record below. Nor does it call into question the adequacy of the legal representation provided by the state defendants who have been party-defendants to at least six lawsuits challenging the constitutionality of Illinois abortion laws.[11] The Seventh Circuit thus properly rejected IPC's "inadequacy" argument, finding that "[a] subjective comparison however, of the conviction of

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[11] *Zbaraz v. Hartigan,* 763 F.2d 1532 (7th Cir. 1985), *appeal filed,* August 19, 1985; *Charles v. Daley,* 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted, Diamond v. Charles,* No. 84-1379, ____ U.S. ____, 53 U.S.L.W. 3824 (May 20, 1985); *Wynn v. Carey,* 599 F.2d 193 (7th Cir. 1979); *Wynn v. Carey,* 582 F.2d 1375 (7th Cir. 1979). *See also Keith v. Daley,* 84 C 5602 (N.D. Ill. 1984), and *Lifchez v. Hartigan,* No. 82 C 4324 (N.D. Ill. 1982). In each of these cases, the State has played an active role in attempting to uphold these laws. Thus, IPC's bold statement that "[t]he political nature of their office, the volatility of the abortion issue, and the complexity of the constitutional issues involved may make [state officials] unable or unwilling to vigorously and adequately defend the [abortion] statute" (IPC Petition at 13) is completely unfounded.

defendants and intervenors is not the test for determining adequacy of representation." *Keith v. Daley,* App. at 19.[12]

IPC cannot substantiate its further contention (IPC Petition at 30-33) that the Seventh Circuit's standard for evaluating "adequacy" contravenes this Court's decision in *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972)("*Trbovich*"). *Trbovich* involved a unique statutory-based action brought by the Secretary of Labor, pursuant to the Labor Management Reporting and Disclosure Act ("LMRDA"), to set aside an election of union officers. Only the Secretary of Labor could initiate LMRDA suits—private parties were barred by law from starting such actions—and LMRDA provided the exclusive remedy for charges of union election violations. 404 U.S. at 531. The Supreme Court found that LMRDA imposed two distinct and arguably conflicting duties upon the Secretary of Labor: the protection of the public interest in democratic union elections; and, the representation of individual union members enforcing rights against the union. *Id.* at 538-39. It was in the latter capacity that the government's representation proved inadequate under Rule 24. *Id.* Thus, the union member was allowed limited intervention to protect his personal rights against the union; he was *not* allowed to intervene in the context of protecting a public policy interest. *Id.*

Several recent decisions, which IPC neglects to discuss, have specifically refused to construe *Trbovich* as establishing a *de minimis* standard for demonstrating inadequacy of representation. *See, e.g., Hooker,* 749 F.2d 968 (2d Cir. 1984) (four environmental groups denied leave to intervene in a govern-

[12] Indeed, despite the opportunity to file an *amicus* brief when the State filed its brief urging the district court to find HB 1399 constitutional, IPC neither filed a brief nor advised the district court either of any additional arguments in support of HB 1399 or any inadequacies in the State's representation.

ment enforcement suit against a pollution hazard);[13] *Commodity Future Trading Comm'n v. Heritage Capital Advisory Services,* 736 F.2d 384 (7th Cir. 1984); *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.,* 732 F.2d 452 (5th Cir.) (*en banc*), *cert denied,* 105 S.Ct. 434 (1984), and 694 F.2d 421 (5th Cir. 1983) (companion case) (consumer groups and city officials denied leave to intervene in action to enforce contract involving utility rates).

The Seventh Circuit correctly found that the named governmental defendants are adequately defending this suit and that IPC makes no supportable allegations to the contrary. *Keith v. Daley,* App. at 20. Thus, IPC has failed to satisfy the third substantive requirement of Rule 24(a)(2).

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[13] Petitioner distorts the facts when it states that its interpretation of *Trbovich* controls in the Second Circuit. (IPC's Petition at 19, citing *New York Public Interest Group v. Regents,* 516 F.2d 350 (2d Cir. 1975) (per curiam) ("NPIRG"). That position was flatly rejected in *Hooker.* As the Second Circuit noted, the *NPIRG* case made no mention of *Trbovich* or of a "minimal burden" but instead allowed intervention because the State was not acting as a *parens patriae* and had conceded its own inadequacy. *Hooker,* 749 F.2d at 987. Likewise *Metropolitan Life Ins. Co. v. Ditmore,* 729 F.2d 1 (1st Cir. 1984) and *Hoots v. Commonwealth of Pennsylvania,* 672 F.2d 1133, 1135 (3d Cir. 1982), do not support IPC's identity of interest standard. The First Circuit in *Ditmore* did not mention *Trbovich* and the Third Circuit in *Hoots* clearly stated that the intervenor has the burden of showing that its interests are "sufficiently different" from those of an existing party that the representative *cannot* defend the intervenor's interest.

CONCLUSION

Both the court of appeals and the district court correctly found that IPC did not satisfy the elements for intervention of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. No conflict as to the appropriate standards for evaluating these elements has been shown. Thus, IPC's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: October 17, 1985